



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

February 24, 1997

OFFICE OF  
SOLID WASTE AND EMERGENCY  
RESPONSE

**Memorandum**

SUBJECT: Regulatory Interpretation on the Applicability of Subtitle I of the Resource Conservation and Recovery Act to Regulate Water Covered Storage Tanks

FROM: Anna Hopkins Virbick, Acting Director /s/  
Office of Underground Storage Tanks

TO: John K. Mason, Chief  
Underground Storage Tank Section, Region 4

This memorandum is in response to your request for a regulatory interpretation concerning the applicability of Subtitle I of RCRA to certain water covered tanks containing carbon disulfide. As you are aware, we have considered four possible interpretations. We have circulated these possible interpretations to all EPA UST Regional Program Managers and to the Office of General Counsel.

After fully considering all possible interpretations and the comments we received from EPA Regional Offices and the Office of General Counsel, we have concluded that the tanks in question are not regulated because they are not underground and do not meet the definition of an underground storage tank. Both the statute and EPA's regulations (40 CFR 280.12) define the term "underground storage tank" to mean: "any one or a combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground." (emphasis added)

The term "underground" is not defined in the law or in the regulations. The term, "beneath the surface of the ground," however, is defined at 40 CFR 280.12 to mean: "beneath the ground surface or otherwise covered with earthen materials." The tanks in question are below grade but are not "beneath the ground surface or otherwise covered with earthen materials." The tanks are covered with water which is not an earthen material. Therefore, the tanks are not "beneath the surface of the ground" and are not regulated.

A brief review of the way the Agency has considered below grade tanks to be regulated further confirms the conclusion that the tanks in question are not regulated. On April 7, 1986, the Agency issued a guidance document that indicated that tanks which were 10 percent or more below grade were regulated even if not covered by ground material. The April 1986 guidance would have

the tanks in question regulated under Subtitle I of RCRA.

The 1987 proposed rule, however, changed the treatment of below grade tanks such as the tanks in question. The April 17, 1987 proposed rule states in 40 CFR 280.12 that beneath the surface of the ground "means beneath the ground surface or otherwise covered with materials so that physical inspection is precluded." The preamble to the proposed rules (p. 12690) explains that this means that: "A tank whose volume is less than 10 percent beneath the surface of the ground and that is below grade but not covered with ground material, such as a tank in a ditch or natural depression, is not included in today's proposal because it is not substantially different from an above ground tank." Thus, the proposed rules changed the April 1986 guidance by removing tanks from Subtitle I jurisdiction that are below grade, not covered with ground materials and whose volume is less than 10 percent beneath the surface of the ground. Tanks covered with water are not considered to be covered with ground materials and, therefore, would not be regulated.

While the language in the proposed rules leads to the conclusion that the tanks in question are not regulated, changes found in the final rule make this explicitly clear. The final regulation in 40 CFR 280.12 changed the definition of "beneath the surface of the ground" in two ways. First, it added the word "earthen" to the phrase "or otherwise covered by materials" to read "or otherwise covered by earthen materials." Second, it dropped the phrase "so that physical inspection is precluded" at the end of the definition. Thus, it is clear in the final rule that below grade tanks not covered by earthen material are not regulated, even if physical inspection is precluded because the tanks are covered by a non-earthen material. The water, in this case, does not preclude physical inspection. Even if it did, however, the regulations would not apply to the tanks in question.

As mentioned above, we have discussed this issue with staff in the Office of General Counsel who concurs with our interpretation. If you have any questions or would like to discuss this issue further, please call John Heffelfinger (703 603-7157) or Bill Lienesch (703 603-7162).

cc: UST/LUST Regional Program Managers  
Katherine Nam, Office of General Counsel  
OUST Program Directions Team  
OUST Desk Officers